



Department of Defense

Appointing Authority Regulation No. 2

January 26, 2006

SUBJECT: Trial Procedures

- References:
- (a) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
 - (b) Department of Defense Directive 5105.70, "Appointing Authority for Military Commissions" (Feb. 10, 2004)
 - (c) Military Commission Order No. 1, current edition
 - (d) Military Commission Instruction No. 8, current edition
 - (e) Military Commission Instruction No. 9, current edition
 - (f) Appointing Authority Regulation No. 2 (November 17, 2004)

1. PURPOSE

This Regulation establishes responsibility for the development of trial practice and procedure in a military commission. This regulation supersedes reference (f).

2. AUTHORITY

This regulation is issued pursuant to Section 6.3 of reference (b) and Section 7(A) of reference (c) and in accordance with reference (a). The provisions of references (d) and (e) are applicable to this Regulation.

3. PROMULGATION AUTHORITY FOR RULES OF PRACTICE AND PROCEDURE

The Presiding Officer may promulgate uniform rules of practice and procedure applicable to all military commissions concerning the form, timing, and processing of motions, as well as other trial procedures, provided that such procedures do not conflict with reference (a) or (b), Military Commission Orders, Military Commission Instructions, and Appointing Authority Regulations, orders or memoranda in their current form and as they may be later issued, amended, modified, or supplemented. The Appointing Authority shall have an opportunity to review all Presiding Officer Memoranda before they are issued. In the event that there is more than one Presiding Officer, the Appointing Authority shall designate a Chief Presiding Officer who may promulgate

changes to rules of practice and procedure only after consultation with all other sitting Presiding Officers and an opportunity for review by the Appointing Authority.

4. INTERLOCUTORY QUESTIONS

- A. *Required Certification of Interlocutory Questions.* In accordance with Section 4(A)(5)(e) of reference (c), the Presiding Officer shall certify all interlocutory questions, the disposition of which would effect the termination of the proceedings with respect to a charge, for decision by the Appointing Authority.
- 1) An interlocutory question would only effect the termination of the proceedings with respect to a charge if, after consideration of the motion or question that arises during the course of a trial, the Presiding Officer (or a majority of the Commission pursuant to Section 6(D)(1) of reference (c)) reaches a conclusion that would effect a dismissal with respect to that charge. An interlocutory question does not arise until the Presiding Officer rules on a motion filed by the parties.
 - 2) If the Presiding Officer (or a majority of the Commission pursuant to Section 6(D)(1) of reference (c)) reaches a conclusion that would not effect a dismissal with respect to a charge, there is no requirement for certification of an interlocutory question.
- B. *Other Interlocutory Questions.* The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate. The Presiding Officer may grant and consider argument by the Prosecution and Defense as to whether an issue should be certified as an interlocutory question.

5. PROCEDURES FOR SUBMITTING INTERLOCUTORY QUESTIONS

- A. *Generally.* An interlocutory question does not arise until a party to the action, by motion, requests any type of relief from the Presiding Officer, who subsequently rules upon the motion.
- 1) The Presiding Officer shall ensure, where appropriate, that evidence, witnesses, and arguments of counsel are entertained before a ruling is made on the motion. The Presiding Officer shall issue a ruling on the motion before the issue considered is certified to the Appointing Authority as an interlocutory question.
 - 2) A request for interpretation of Commission rules and procedures from the Presiding Officer or parties to an action does not constitute an interlocutory question. If the Presiding Officer has questions concerning Commission rules and procedures, he or she shall exercise discretion in interpreting such rules with the interests of a full and fair trial in mind. Such determinations by the Presiding Officer do not become interlocutory questions unless challenged by motion by one of the parties to the case, the Commission issues a ruling on the

motion, and the Presiding Officer subsequently certifies the issue raised pursuant to subsection 4, above.

B. Commission Procedures Prior to Submitting an Interlocutory Question.

- 1) Once the Presiding Officer decides to certify an interlocutory question, the Presiding Officer will notify the Prosecution and Defense whether the certification was required or optional.
- 2) The Presiding Officer will inform the Prosecution and Defense of the decision on the issue and the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority. The Presiding Officer will also inform the Prosecution and Defense whether the proceedings will be held in abeyance until the Appointing Authority provides a response.
- 3) The Presiding Officer, may at his discretion, grant and hear argument from the Prosecution and Defense on the appropriateness of the documentary or other materials the Presiding Officer intends to forward to the Appointing Authority, and whether the proceedings will be held in abeyance until the Appointing Authority provides a response.

C. Commission Procedures after Receiving a Response from the Appointing Authority.

- 1) Once the Presiding Officer receives a response from the Appointing Authority, he will provide the response to the Prosecution, Defense, and other Commission Members and conduct the Commission consistent with the Appointing Authority's response.
- 2) The Appointing Authority's response and the documents the Appointing Authority considered will be made a part of the Record of Trial and subject to review in accordance with reference (e).

6. MATERIAL SUBMITTED TO THE APPOINTING AUTHORITY

A. When submitting an interlocutory question to the Appointing Authority, the Presiding Officer will provide the following:

- 1) A memorandum that states:
 - a. Whether the certification of the interlocutory question was required or optional;
 - b. The interlocutory question or issues presented to the Appointing Authority;
 - c. The decision of the Presiding Officer, subject to Section 6(D)(1) of reference (c);
 - d. A list of the documentary or other materials, if any, the Presiding Officer forwarded to the Appointing Authority in conjunction with an interlocutory question; and

- e. Whether the Presiding Officer is holding the proceedings in abeyance until receiving a response on the interlocutory question.
- 2) Portions of the record of trial, including all applicable exhibits that pertain to the certified questions or issues.
- B. The Appointing Authority may return the interlocutory question to the Presiding Officer with direction to obtain additional information.

7. INTERLOCUTORY QUESTION CERTIFICATION EFFECT ON PROCEEDINGS

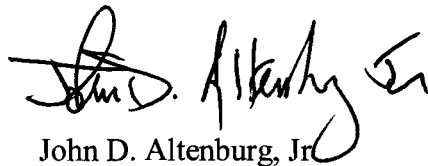
While decision by the Appointing Authority is pending on any certified interlocutory question, the Presiding Officer may elect either to hold proceedings in abeyance or to continue.

8. OTHER

This Regulation is prospective in application and shall not serve as a basis to challenge or reconsider decisions made prior to the effective date of this Regulation.

9. EFFECTIVE DATE

This Regulation is effective immediately.

A handwritten signature in black ink, appearing to read "John D. Altenburg, Jr.", with a stylized flourish at the end.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions